

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 BRUCE E. SMITH,

10 Petitioner,

11 v.

12 JEFFREY UTTECHT,

13 Respondent.
14

Case No. C06-5678RJB

ORDER DENYING CERTIFICATE
OF APPEALABILITY

15 This matter comes before the court on the petitioner's Notice of Appeal. Dkt. 41. The court
16 must consider whether to grant or deny the petitioner a Certificate of Appealability. *See* 28 U.S.C.
17 2253(c)(3). The court has reviewed the record herein.

18 PROCEDURAL HISTORY

19 On August 30, 2007, U.S. Magistrate Judge Karen L. Strombom issued a Report and
20 Recommendation, recommending that the court dismiss the petition for writ of habeas corpus. Dkt.
21 35. On October 12, 2007, the court issued an order denying the petition for writ of habeas corpus,
22 concluding that petitioner's claim related to the suppression hearing was unexhausted and
23 procedurally barred, and that his claims regarding newly discovered evidence and prosecutorial
24 misconduct did not warrant habeas relief. Dkt. 39. Petitioner has now appealed to the U.S. Court of
25 Appeals for the Ninth Circuit. Dkt. 41.

1 STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

2 The district court should grant an application for a Certificate of Appealability only if the
3 petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §
4 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner
5 must make a showing that reasonable jurists could debate whether, or agree that, the petition should
6 have been resolved in a different manner or that the issues presented were adequate to deserve
7 encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (*quoting*
8 *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). When the court denies a claim on
9 procedural grounds, the petitioner must show that jurists of reason would find it debatable whether
10 the petition states a valid claim of the denial of a constitutional right and that jurists of reason would
11 find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*,
12 120 S.Ct. at 1604.

13 DISCUSSION

14 This court dismissed petitioner’s claim regarding a suppression hearing as unexhausted and
15 procedurally barred. This claim was therefore dismissed on procedural grounds. There is nothing in
16 the record that would support a conclusion that jurists of reason would find it debatable whether the
17 petition states a valid claim of the denial of a constitutional right and that jurists of reason would find
18 it debatable whether this court was correct in its procedural ruling.

19 Petitioner’s second and third claims, based upon newly discovered evidence and prosecutorial
20 misconduct, were reviewed on the merits. Petitioner has not made a showing that reasonable jurists
21 could debate whether, or agree that, the petition should have been resolved in a different manner or
22 that the issues presented were adequate to deserve encouragement to proceed further.

23 The Certificate of Appealability should be denied.
24
25

Accordingly, it is hereby **ORDERED** that petitioner's motion for a Certificate of Appealability (Dkt. 41) is **DENIED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 14th day of December, 2007.